NO. 77472-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIAN LORD,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 30402-3-II
Kitsap County Superior Court No. 86-1-00470-8

SUPPLEMENTAL BRIEF OF RESPONDENT

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DATED July 5, 2006, Port Orchard, WA
Original: Supreme Court
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1. Whether Lord has failed to show he was denied a fair trial because spectators wore small buttons depicting the victim during three days of his 31-day trial?

2. Whether the trial court properly excluded dog-tracking evidence that did not make any fact of consequence more or less probable?

II. STATEMENT OF THE CASE

Brian Lord was convicted upon retrial for the 1986 aggravated murder of Tracy Parker in Kitsap County Superior Court. The Court of Appeals affirmed. The relevant facts are set forth in the Court of Appeals' opinion:[1]

> On the first day of trial, defense counsel asked the trial court to forbid some spectators in the courtroom[2] from wearing buttons bearing a "head and shoulder shot" of Tracy Parker, about two and a half inches in diameter.[3] According to the prosecutor, she was unable to recognize whose photograph was depicted on the buttons when she stood six to ten feet from the front row of the jury. The trial court denied Lord's motion to forbid the buttons. Lord neither moved for a mistrial nor requested a curative jury instruction.
>
> [2] Out of 31 spectators in the courtroom, 13 were wearing these buttons.
>
> [3] The buttons had no writing on them.
>
> On the second day of trial, no one mentioned the buttons. On the third day of trial, eight spectators wore the buttons. Before trial on the fourth day, the trial court directed the spectators not to wear the buttons. The record does not mention that

[1] The trial proceedings occupy more than 30 volumes of transcripts. Due to space constraints, the State would, as has Lord, refer the Court to its brief below, at 3-32, for a complete account of the facts with record references.

anyone wore the buttons in the courtroom thereafter.

* * *

Tracy Parker was 16 years old in 1986 when she regularly rode horses at the home of Sharon and Wayne Frye in Poulsbo with their permission. There was a one-half mile path through the woods between the Frye and the Parker residences.

Brian Keith Lord was a friend of the Fryes and worked for them as a handyman. He became acquainted with Parker at the Frye residence while he was there working and she was there riding the horses.

Lord had lived with the Fryes in the past, but he had moved in with his girlfriend a month before Parker's murder. Lord worked various odd jobs, including working on the Fryes' roof; he had permission to enter the Fryes' house and to use their telephone.

Lord also worked at his brother Kirk's business, Door Details. In September 1986, Kirk was working in California, where he was joined by his wife and sons.

I. Lord's and Parker's Activities on the Days Preceding her Murder

On September 15, 1986, Robert Machinski, a co-worker, helped Lord burn some old green fencing. They used an orange U-Haul blanket to sweep the remaining debris, and Lord dropped part of the blanket into the fire and singed it. When they were done, Machinski folded the blanket and put it in Kirk's shop.

Kirk's wife, Robin, notified her parents, the Carrolls, that she and Kirk were returning from California on September 16. During the day, on September 16, Don Carroll made three trips to Kirk's house to deliver wood for the family when they returned. The Carrolls went out for their anniversary dinner around 6:30 p.m.

At approximately 6:30 or 7:00 p.m., Lord was late for a meeting with Chris Rongve to discuss work. Rongve was busy speaking with other people, but he saw Lord waiting in his car with a beer between his legs. Lord and Rongve rescheduled their meeting for another time.

Earlier that same day, Parker had told her mother that she was going to ride horses after school. No one was home at the Frye residence that evening, but several people saw Parker riding the Fryes' horse between 7:00 and 8:00 P.M. While riding, Parker stopped at separate times to talk with Pat Germaine and Jana Vanderdoes May, telling them she planned to return the horse before dark and go home.

According to the Fryes' telephone bill, someone used their phone to call Lord's apartment from 7:44 until 7:56 p.m. At approximately that time, Lord's girlfriend spoke with Lord on the phone, she was upset because Lord was not at their apartment for a special dinner with her family. Lord was also supposed to be building a dinner table for their apartment at Kirk's shop. Lord told his girlfriend that he would be late for the dinner, but he was not sure how late.

Sometime around 8:00 p.m., Parker called her friend Taunya Olson, but Taunya's mother said that she could not come to the telephone. Parker did not say from where she was calling, but Taunya's mother said Taunya would call her back.

Mrs. Frye left her friend's house to go home at approximately 8:00 p.m. and would have arrived home around 8:30. No one was at her house when she arrived, and nothing appeared out of order.

Parker's mother, Barbara, came home from work at approximately 8:30 p.m. Parker was not home yet. Barbara fell asleep waiting for her daughter in the living room.

Expecting Robin and Kirk to arrive home at 9:00 p.m., the Carrolls finished eating dinner and went to Kirk's house at about 8:30 to start a fire for them.

At 8:35, Lord drove Kirk's truck quickly into Kirk's driveway; the truck was smoking and steaming. Lord got out of the truck, wearing only jeans. He looked like he was preparing to leave in his Camaro until Don Carroll told Lord that Kirk was coming home.

Lord then washed the truck and hosed down the bed, leaving debris still in it. Lord also hosed off one side of the Camaro. He told Don Carroll that he was building a stereo cabinet for Kirk, but Lord would not let Carroll see it.[7]

[7] Not only did Lord not make a stereo cabinet for Kirk, but also he did not make a dining table for the apartment he shared with his girlfriend.

Kirk and his family arrived home between 9:00 and 9:30 p.m. Kirk spoke with Lord for 10 to 15 minutes and then went inside his house. Kirk did not go into the shop that night. Lord remained outside the house for another 20 to 30 minutes and then left in his Camaro.

When Lord arrived at his apartment at approximately 10:00 p.m., dinner guests were sitting in the living room. Lord leaned against the wall with a blank look on his face, and no one said anything. After a few moments, one guest, Dennison, said, "Somebody say something." Lord turned and walked into the bathroom.

Some of the guests left, but Lord did not come out of the bathroom. When Lord came out of the bathroom five or six minutes later, he walked into the kitchen and cleaned a cut on his arm. He offered no explanation for why he was late.

The next morning, September 17, Kirk woke up at approximately 8:00 a.m. Lord was already outside moving shop wood scraps and about 10 to 12 inches of sawdust from the back of Kirk's blue truck into a beige truck owned by his Lord's girlfriend's father. On the shop floor were water puddles, apparently caused by someone having hosed it out the night before.

II. Parker Discovered Missing

When Parker's mother, Barbara, woke up that same morning, September 17, she noticed that Parker had not come home. Parker had not slept in her bed and her purse was still there. Barbara called Parker's father, but he had not heard from Parker either. Nor did Parker attend school that day, September 17.

Around 10:00 a.m., approximately 100 people gathered at the Parker residence and began to look for Parker; they searched the area until dark. The Kitsap County Sheriff's Department was treating Parker as a runaway, so the family hired a private investigator and dog tracker to search for Parker.

Paul Holden, Robert Huff, and Greg Ayers attended school with sisters, Tracy and Shannon Parker. The three males knew

Tracy and Shannon as acquaintances. Holden, Huff, and Ayers had been riding in a car together sometime around September 17, when they believed they saw Tracy Parker walking on the side of the road. After learning that Tracy Parker was missing, they reported to police that they thought they had seen her.

On September 21, the Parkers and a local boy scout with search and rescue experience organized another search party of more than 200 people. Late in the day, they found Parker's jacket, red sweatshirt, jeans, underpants, and shoes near Island Lake. Nearby, they found a bath towel that looked like the towel used as a curtain in the Fryes' garage. The search leader called the sheriff's department.

Deputies arrived, photographed the scene, and collected the clothing. Before sending the clothing to the crime lab, Detective Hudson examined it and found wood chips, paint chips, and charcoal or sand. From that point on, the Sheriff's Department treated Parker's disappearance as a major crime.

On September 22, a third search party found an orange U-Haul blanket in a residential construction area near where the clothes had been found; the blanket appeared to have blood stains on it, and it was singed. A deputy seized the blanket. Machinski read about the blanket in the newspaper and, recognizing the blanket as similar to the one he had helped Lord use to unload debris at Kirk's shop, he contacted the police.

III. Investigation

On September 24, Lord told detectives that (1) he had last seen Parker about two weeks earlier when she was riding a horse at the Frye residence; (2) he had not seen her on September 16; (3) on the 16th, he had been at his brother Kirk's house during the day, polishing Kirk's truck and building a coffee table; (4) after going home for a while, he returned to the Fryes' house; (5) he did not see anyone at the Frye residence, but the door to the basement was open; (6) he used the telephone to call his brother Kirk and then went back to Kirk's house; (7) Lord returned home some time between 9:00 and 10:00 p.m.; and (8) he returned to Kirk's house the next morning to spray lacquer on the table that he built and to

work on Kirk's truck. Lord mentioned nothing about having driven Kirk's truck on the 14th or the 16th.

Lord told his girlfriend's father that (1) Parker was missing; (2) if he were looking for someone, he would look in the Island Lake area; and (3) he could have been the last person to see Parker alive because he had seen her the day she disappeared. Lord's girlfriend's father called the police after reading a newspaper article reporting that Lord had told the police he had not seen Parker on the day she disappeared.

On September 27, detectives went to the Frye residence. While examining the basement, detectives found red stains on the door panel, red splatters on the wall and ceiling next to the door, and red drops on the floor and near the base of the wall.

On September 29, detectives inspected Kirk's property. There were wood shavings on the floor of the shop similar to those found on Parker's clothes and the blanket. The overhead door had red splatters on it, and there were swirls adjacent to the splattered area, as if the area had been cleaned. Detectives collected samples of the red stain and the shavings on the floor.

About 10 feet from the shop was a fire pit and a sand pile. The sand was "sharp" like the sand found on Parker's clothes. The detectives collected some sand, a broom from Kirk's shop, a rope from the back of Kirk's blue truck; floor sweepings from the cab of the blue truck; the truck's steering wheel; and paint samples from the truck's exterior.

IV. Lord's Arrest

On September 30, teenagers riding horses discovered Parker's body in some bushes off the road. Her sweatshirt, polo shirt, T-shirt, and bra were pushed up above her breasts. They called 911 and officers arrived within five to ten minutes. The Kitsap County Sheriff's Department asked members of King County's Green River Task force to assist in processing Parker's body.

On September 30, detectives went to Lord's residence to speak with him again, but Lord said he had a job to do and he would not be home until 6:00 p.m. When the detectives returned at 4:45, Lord was home. They asked Lord to come to

the sheriff's office for questioning, and he agreed. The detectives read and Lord waived his *Miranda* rights. Lord then gave a statement.

For the most part, Lord's statement was similar to the one he had previously given detectives on September 24. This time, however, Lord told the detectives that the last time he had driven Kirk's blue truck was September 14. Lord contradicted himself: He first stated that no one else was present when he was at Kirk's residence on the 16th from 8:00 to 9:00 p.m.; later, he said that the Carrolls had been at Kirk's residence "the entire time."

When detectives asked if Lord knew whether Parker had a crush on anyone, Lord said that Parker "had the hots for" Matt Kelly and someone named "Dave." Lord also stated that Parker was attractive and starting to "fill out."

Lord told detectives that (1) he had smoked marijuana and had been drinking alcohol approximately two weeks before that interview; and (2) when he uses alcohol and marijuana together, he loses control and becomes a different person.

V. Post-Arrest

After officers arrested him, Lord called Machinski several times from the jail to discuss what Machinski had told police. Lord offered to give Machinski a truck and a motorcycle if he would change what he had told police about the color of the U-haul blanket.

Lord also contacted his friend Thomas DeMars. Lord asked DeMars if he could find someone who would tell the police that he or she had been driving Kirk's truck on September 16.[9] Lord offered to give DeMars a truck and motorcycle if DeMars would tell police that he (DeMars) was driving Kirk's truck that day. Lord called DeMars multiple times about this offer.

[9] Some of the items found on Parker's clothes matched items found in the truck and sweepings from the truck: charcoal, colored fibers, green paint chips, blue paint chips, and metal shavings.

On October 2, the medical examiner, Dr. John Howard, performed the autopsy on Parker and determined that the time of death had been 10 to 20 days earlier. Parker's body had sustained many blunt force injuries; blunt force impact to her

head was the cause of her death. The medical examiner also found (1) a laceration of her labia caused by a hard blunt object; (2) sperm in her vagina; and (3) insects on her body, which he did not recall collecting for evidence.

* * *

The State crime lab tested various pieces of evidence and completed comparative analyses with the following results:

Charcoal fragments: Fragments of charcoal, similar to those on the singed, orange U-Haul blanket, were also collected from the clothes found at Island Lake, the broom from Kirk's shop, in the sweepings from Kirk's blue truck, on the clothes that remained on Parker's body, and in Parker's hair.

Orange fibers: The orange U-Haul blanket was made of tough, course polyester fiber. Consistent orange fibers were collected from the clothes found at Island Lake, the clothes that remained on Parker's body, Parker's hair, the blue blanket from Kirk's shop, and the rope from the back of Kirk's truck.

Pale brown carpet fibers: Pale brown fibers were collected from the red sweatshirt and the towel found with Parker's clothes in Parker's hair, on the orange U-Haul blanket, and in the debris from Kirk's blue truck. The source of these fibers was unknown.

Red cotton fibers: Red cotton fibers were on the orange U-Haul blanket and the jeans found at Island Lake, on the clothing on Parker's body, on Kirk's blue truck's steering wheel, and in the sweepings from the truck.

Royal blue cotton fibers: The polo shirt found on Parker's body was made of royal blue cotton fibers. Matching royal blue cotton fibers were found on Kirk's blue truck's steering wheel.

Plaster: Plaster was found on the orange U-Haul blanket, on the clothes found at Island Lake, and on the clothes on Parker's body.

Yellow paint chips: Consistent yellow paint chips were found on the orange U-Haul blanket and on the clothes on Parker's body.

Red paint chips type 1: Red paint chips type 1 were collected from the orange U-Haul blanket, the jeans and sweatshirt found in the Island Lake woods, Parker's hair, and the blue blanket and broom in Kirk's shop.

Red paint chips type 2: Red paint chips type 2 were collected from the orange U-Haul blanket, the Island Lake clothing, and the clothes on Parker's body.

Green paint chips type 1: Green paint chips type 1 found on Parker's leg and in Kirk's shop sweepings matched the paint on the fence that Lord had demolished and burned on September 15, 1986.

Green paint chips type 5: Green paint chips type 5 collected from the orange U-Haul blanket, Parker's jacket and the red sweatshirt found in the brush at Island Lake, and the sweepings from Kirk's blue truck also matched paint on the same fence.

Blue paint: Detectives scraped blue paint from Kirk's truck. They also collected "consistent" blue paint chips from the orange U-Haul blanket, the clothes found at Island Lake, the clothing on Parker's body, Parker's hair, Kirk's blue truck's steering wheel, the debris inside the truck's cab, and the broom police had seized from Kirk's shop on September 29.

White paint chips: White paint chips were collected from the orange U-Haul blanket; debris from the truck; the jacket, towel, jeans, and red sweatshirt found in the brush at Island Lake; and the clothes on Parker's body.

Metal shavings: Metal shavings, consistent in color and shape and microscopically and chemically indistinguishable, were collected from the orange U-Haul blanket, the Island Lake clothing, Parker's body, the cab of Kirk's blue truck, and the broom from Kirk's shop.

Dog Hair: There were 16 dog hairs on the orange U-Haul blanket, four on the clothes at Island Lake, and eight in the shop were "consistent" with hairs from Kirk's dog "Tammy." Eight other dog hairs on the blanket, nine on the Island Lake clothes, six hairs from the clothes on Parker's body, and six hairs from the shop were consistent with the Fryes' dog, "Shandy."

> Since 1986, several different laboratories have tested the blood and other fluid samples. There were multiple attempts to test the vaginal swabs for DNA, but the samples were so small and deteriorated that the results did not produce a conclusive DNA profile.
>
> Mitotyping Technologies tested a hair from the Island Lake towel for mitochondrial DNA. The results excluded Parker, Wayne Frye, and Machinski, but the sequence was the same as Lord's. Statistically, only .06 percent of the population would have the same sequence as Lord, and his maternal blood line. LabCorp conducted the same type of testing on a hair collected from the orange U-Haul blanket and found that it matched Lord's hair and excluded 99.4 percent of the population.
>
> LabCorp tested one of the wood scrapings, which contained red splatter from the inside of the overhead shop door at Kirk's residence. The test produced a complete genetic profile consistent with Parker and excluding Lord as the source of the blood.

State v. Lord, 128 Wn. App. 216, ¶¶ 6-7, 22-59 & 62-80, 114 P.3d 1241 (2005) (footnotes 2-3, 5-6 & 8-11 omitted).

III. ARGUMENT

A. LORD FAILS TO ESTABLISH INHERENT OR ACTUAL PREJUDICE FROM SPECTATORS WEARING SMALL BUTTONS BEARING A PHOTO OF TRACY PARKER DURING FOUR OF THE THIRTY ONE DAYS OF TRIAL.

Lord claims that he was denied a fair trial because during the first few days of trial several spectators wore small buttons bearing a photograph of Tracy Parker. The Court of Appeals properly determined that this claim was without merit because Lord failed to establish that the buttons, which were banned from the courtroom early in the trial, in any way rendered his trial

unfair.

This Court has held that use of in-life photographs of the victim as evidence in the trial itself is not inherently prejudicial, especially in a case where the jury will also view crime scene photographs of the victim. *State v. Pirtle*, 127 Wn.2d 628, 651-53, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996); *State v. Furman*, 122 Wn.2d 440, 452, 858 P.2d 1092 (1993). Here, both crime scene and in-life photographs of the victim were in evidence and were viewed by the jurors. Therefore, it is difficult to see how allowing the spectators to briefly wear badges portraying a photograph of the victim, with no editorial content, was inherently prejudicial or eroded Lord's right to a fair trial.

Lord does not argue that he suffered any actual prejudice as a result of the trial court's initial decision to allow the spectators to wear the buttons. Numerous courts have rejected the contention that buttons bearing a victim's photo are inherently prejudicial. These same courts have also declined to find actual prejudice in contexts like those here.

In *Johnson v. Commonwealth*, the court found no merit in the argument that the jurors could be presumed to assume the spectators' buttons were related to the case where there was nothing in the record to support the contention that any of the jurors saw the buttons displaying the victim's

photograph. *Johnson v. Com.*, 259 Va. 654, 676, 529 S.E.2d 769, *cert. denied*, 531 U.S. 981 (2000). In *Nguyen v. State*, the court rejected a similar claim where the defendant failed to demonstrate actual prejudice:

> Although defense counsel stated, "It'll be clearly visible to the jurors," the record contains no indication where the individuals were sitting, whether they were seated together, or if the jurors did in fact see the buttons from where they were seated. It is impossible to tell from this record whether the buttons even came close to being such an overwhelming presence in the courtroom that it was reasonably probable they influenced the jury's verdict.

Nguyen v. State, 977 S.W.2d 450, 457 (Tex. App. 1998), *aff'd*, 1 S.W.3d 694 (Tex. Crim. App. 1999).

In *State v. Braxton*, the court distinguished *Norris* and *Franklin* on the grounds that the buttons displayed no affirmative message, but instead bore only an image of the victim. *State v. Braxton*, 344 N.C. 702, 710, 477 S.E.2d 172 (1996). Similarly, in *State v. Bradford*, the Kansas Supreme Court rejected *Norris*' applicability to buttons that only bore a likeness of the victim absence actual evidence of prejudice. *State v. Bradford*, 864 P.2d 680, 686-87 (Kan. 1993); *see also Cagle v. State*, 6 S.W.3d 801, 803 (Ark. App. 1999); *Kenyon v. State*, 946 S.W.2d 705, 710-11 (Ark. App. 1997).

Here, the small buttons bore a photo of Tracy while she was alive and had no writing. 7RP 695, 9RP 970, 1147. The prosecutor noted, without contradiction by the defense that standing six to ten feet away from the jurors

in the front row, she was unable to recognize who was depicted in the photos. 9RP 1147. On the first day of trial 13 of 31 spectators wore the buttons. 9RP 970. No mention was made of the buttons on the second day of trial. 8RP 862-966. On the third day of trial there were eight buttons. 9RP 970. Before trial began on the fourth day, the trial court directed the spectators not to wear the buttons. The court made this ruling in an abundance of caution despite not finding any inherent prejudice. 10RP 1195.

In short, the evidence was that the buttons were relatively small, probably not discernable from the jury box, bore no overt message, were not accompanied by any official endorsement, and were removed after the third day of a 31-day trial. No court has held such buttons inherently prejudicial, and the record herein does not demonstrate actual prejudice.

A fair trial occurs when the verdict is based on the evidence and not on factors external to the proof at trial. *Holbrook v. Flynn*, 475 U.S. 560, 572, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986). Lord has not demonstrated that the verdict in this case was based on any factor external to the evidence presented at trial. In the absence of inherently prejudicial effect, "if the defendant fails to show actual prejudice, the inquiry is over." *Flynn*, 475 U.S. at 572.

Lord relies upon *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), where spectators associated with NOW wore buttons bearing the slogan "Women

Against Rape," with the word rape underlined with a bold red stroke. The spectators were present in the hallway and elevators shared with the jurors, and helped prepare refreshments on behalf of the State. Several jurors stated that they were aware of the buttons and their message, which was apparently large enough to be read from the jury box. The court found that the rape buttons created an inherent prejudice. The Court therefore applied the standard used to evaluate claims that a courtroom arrangement is inherently prejudicial: whether "an unacceptable risk is presented of impermissible factors coming into play." *Flynn*, 475 U.S. at 570. *See also State v. Franklin*, 174 W. Va. 469, 327 S.E.2d 449 (1985) (prejudice found where 10-30 spectators with "MADD" buttons, led by uniformed elected county sheriff, sat directly in front of the jury in a DUI trial and the same sheriff had handed out MADD buttons in the hall including one to a member of the venire).

Lord also relies on *Musladin v. Lamarque*, 427 F.3d 653 (9th Cir. 2005), *cert. granted*, 126 S. Ct. 1769 (2006). In that case, the survivors wore buttons similar to those here. They wore them, however, every day for all 14 days of trial. *Id.*, at 655. The court concluded that the buttons were inherently prejudicial and denied the defendant a fair trial. As discussed above, no other court has found buttons bearing only the picture of a victim to be inherently prejudicial. Such a holding is contrary to *Flynn*, upon which *Musladin* purports to rely. Nor can the buttons seriously be deemed comparable to the

forced wearing of jail garb, which was the practice condemned in *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976), upon which *Musladin* also purports to rely. The State suspects that the Supreme Court has granted certiorari to correct this misapplication of its precedent. This claim should be rejected.

B. THE TRIAL COURT PROPERLY EXCLUDED IRRELEVANT DOG TRACK EVIDENCE.

Lord also faults the Court of Appeals for not finding that the trial court erred in excluding testimony from the dog-tracker, Anderson, regarding his activities. This claim is without merit because the trial court properly found that the proposed evidence lacked relevance. Moreover, any error would be harmless.

A trial court's decision to exclude evidence will only be reversed if it abused its discretion. *State v. Picard*, 90 Wn. App. 890, 899, 954 P.2d 336, *review denied*, 136 Wn.2d 1021 (1998). The defendant's right to present evidence in support of his case is limited by the requirement that the proffered evidence not be "otherwise inadmissible." *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993). Further, "a criminal defendant has no constitutional right to have irrelevant evidence admitted." *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

Lord claims that the evidence was relevant because "evidence that the last time Parker was at the Frye stable she left on foot through the woods, directly controverts the state's theory that Lord abducted Parker from the Frye residence on September 16, 1986." Supp. Br. of Petitioner, at 10.

Contrary to Lord's claims, the Anderson evidence would not have added anything but speculation to the case. First, Anderson did not simply say the track went off through the woods to the road. More accurately, Anderson tracked a trail that apparently paralleled the Frye driveway to the road, which he then followed for approximately a mile before the track ended. 6RP 581, 604. There is nothing in the State's theory of the case that would be inconsistent with Lord picking Tracy up as she walked home along the road rather than directly from the Fryes' property.

Further, Anderson could not say that the track was laid on the evening Tracy disappeared. Anderson conceded that the track could last for up to 17 days. 6RP 592. The track could have been laid as early as September 4.

Most significantly, Tracy had been at the Frye's on September 15, and had left on foot, after Ms. Frye declined to give her a ride. 9RP 987-88. Even accepting Anderson's opinion that a dog track could show someone walked down the street and got into a car, the track does not thus make it any more or less probable that on September 16, Tracy got into Lord's car at the Frye

home. It is just as probable that Lord *did* pick up Tracy on September 16 in the Fryes' driveway, where the track began, and that the track the dog followed was from September 15, when Tracy also rode the Fryes' horses. 9RP 987.

Furthermore, even if the track had been laid on September 16, it would not make the State's theory, or Lord's innocence any more or less probable. The forensic and circumstantial evidence of Lord's guilt is the same regardless of whether he picked Tracy up in the Fryes' driveway or whether he may have picked her up a half of a mile down the road. *Cf.* 6RP 581 & 8RP 887, 889.

Lord spends a considerable amount of time discussing whether Anderson was qualified under *State v. Loucks*, 98 Wn.2d 563, 656 P.2d 480 (1983), to testify as a dog handler. Neither the trial court nor the Court of Appeals ruled on this basis, however. Regardless of whether Anderson was qualified, the evidence was irrelevant.

Finally, an evidentiary error which is not of constitutional magnitude, such one involving the admission of evidence, requires reversal only if the error, within reasonable probability, materially affected the outcome. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). The error is "not prejudicial unless, within reasonable probabilities, the outcome of the trial

would have been materially affected had the error not occurred." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The error is harmless if the evidence is of minor significance compared to the overall evidence as a whole. *See Bourgeois*, 133 Wn.2d at 403.

As outlined by the Court of Appeals, there was an overwhelming amount of forensic and situational evidence tying Lord to the murder. Contrary to Lord's claim, the "significant amount of evidence that [Tracy] Parker was still alive on September 16th and actually died several days later," Supp. Br. of Petitioner, at 19, was anything but significant. Defense witnesses Holden, Ayers, and Huff, who were teenagers at the time of the murder in 1986, allegedly saw Tracy alive on September 17. However, none of the three personally knew Tracy. 31RP 4370, 4401, 4417. They only saw the girl on the roadside from a moving vehicle for a few seconds. 31RP 4409, 4425. None had seen her in the preceding several months. 31RP 4389, 4425. Moreover, contrary to the claims of certainty Lord's counsel sought to elicit at the time of trial, 17 years after the fact, at the time the boys contacted the police there was, by their own admission, "absolutely" some uncertainty as to whether it was even Tracy that they had seen. 31RP 4425. Additionally, the Parker residence was half a mile from the intersection where the boys saw the girl walking. 9RP 1025, 31RP 4402. Tracy's sister Shannon, who bore a "striking resemblance" to Tracy, 35 RP 4998, worked until 5:00 p.m. on

September 17, and then went to the Parker residence. 9RP 1154. The boys saw the girl between 4:00 p.m. and 6:00 p.m., though this account varied as well. 31RP 4385, 4386, 4407, 4414, 4419. Shannon participated in the searches for Tracy that week, "basically walking around the neighborhood looking for her." 9RP 1155. While Shannon did not specifically recall searching on the 17th, the boys were also less than certain as to the precise day they saw the girl. 9RP 1159, 1167, 31RP 4375, 4380, 4407. Huff originally believed that it was *not* the 17th. 31RP 4386. Thus, Shannon had the physical opportunity to have been present when the boys saw her. The boys, none of whom knew either girl well, and none of whom had seen her for several months, could easily have mistaken Shannon for Tracy. 9RP 1164-65, 31RP 4370, 4389, 4401, 4417, 4425. There thus was no "significant" evidence that Tracy was alive on September 17. In light of the overwhelming forensic evidence and Lord's highly peculiar verdict, there is no likelihood the admission of the dog-track evidence would have affected the outcome of the trial.

Lord avers that his Sixth Amendment rights were affected by the trial court's decision. The scope of a defendant's exercise of the right of confrontation is, however, left to the court's broad discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). Even if an error beyond an evidentiary question could be proved in this case, it too, is subject to harmless

error analysis. Washington courts use the "overwhelming untainted evidence test," whereby even constitutional error is harmless if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). For the same reasons that this proposed evidence was of marginal relevance at best, as discussed above, under either analysis, the exclusion of Anderson's testimony, if error, would be harmless.

IV. CONCLUSION

For the foregoing reasons, Lord's conviction and sentence should be affirmed.

DATED July 5, 2006.

Respectfully submitted,

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